The two main heads of nuisance complained of in this case are injury to property and interference with personal comfort. The plaintiffs have produced ample evidence to show that smoke, ashes, dust and rice husks which emanate from the defendants' premises cause discomfort to their employees and injury to their property. They have indeed produced evidence to show that the nuisance complained of is injurious to health, although it is not necessary to constitute a private nuisance that the acts or state of things complained of should be noxious in the sense of being injurious to health. All that they are required to show is that there is material interference with the ordinary comfort and convenience of life. To my mind, smoke, ashes, dust and rice husks, either together or singly, which materially interfere with the physical comfort of human existence, constitute a nuisance in law.

Where an absolute legal right of the plaintiff to the peaceful enjoyment of his property is infringed, he is entitled to nominal damages even though no actual perceptible damage is proved: for in such a case the law presumes damage. As regards damage to property, the plaintiffs have proved that they have had to incur about $200 a month as additional labour costs by their having to clean all the dust, ashes and rice husks which get deposited on their machines. Thus, the plaintiffs have made out a case both for an injunction to restrain them from committing the nuisance and for damages for the injury done.

It has been suggested that the defendants should be ordered to pay all these damages even though they are not wholly responsible for the nuisance. Having visited the scene during the hearing, I am satisfied that from the time of the filing of the action Lim Seng Rice Mill, being directly behind the plaintiffs' premises, has contributed greatly to the nuisance complained of. The defendants and Lim Seng Rice Mill cannot be treated as joint tort-feasors, as each is responsible for its own actions and there is no proof that they have acted in collusion. In such a case each of the contributors is liable for a nuisance and for his own proportion of the total damage. I would make the defendants responsible for a little more than a quarter of the total damages and award a sum of $1,500 against them.

The next question I have to consider is whether an injunction to restrain the defendants from burning the rice husks should be granted in view of the fact that at some time between the writ and the trial this nuisance has been abated. *Prima facie,* if a nuisance is shown to have existed at the time the writ was issued, the plaintiff is entitled to an injunction. *Rapier* v. *London Tramways Company* [5] is an authority for the proposition that the court may grant an injunction even though the wrongful acts complained of had already ceased. However, if between the writ and the trial the nuisance has been abated, the court may stay its hand and merely give the plaintiffs leave to apply in the action for an injunction if the trouble should recur, but an important consideration is the past conduct of the defendants and their attitude from the outset to the very reasonable complaints which were brought to their attention, and an attitude of indifference to complaints as tending to show irresponsibility is not an irrelevant consideration where the granting of an injunction is concerned. I am compelled to say that in this case the defendants paid scant attention to the complaints of the local residents or to the representations of the local authorities before the writ was issued. They were dilatory in taking the necessary steps recommended for the disposal of the ashes and the rice husks on their premises. Their attitude seems to have been that what they were doing was a reasonable user of their premises, and it was even suggested that the plaintiffs should put up a high fence on their own premises so as to escape injury from the nuisance complained of. In the circumstances I will make the necessary order to restrain them from burning their rice husks on their property.

I entertain some doubt as to whether the plaintiffs are entitled to an injunction to restrain the defendants from causing any danger from fire to the plaintiffs' premises. In my opinion the correct view is that the mere deposit on one's premises of something which is likely to catch fire does not in itself constitute a nuisance. If a fire starts on the premises and spreads to the adjoining property, the basis of liability in my opinion will not be on the ground of nuisance. The order for injunction will therefore be as prayed in paragraph 9(a) and (c) of the statement of the claim. There will also be judgment for $1,500 by way of damages and costs.

Injunction granted.

Solicitors: *Skrine & Co.; Eugene Lye & Co.*

DEMON v. PUBLIC PROSECUTOR

[A.Cr.J. (Silke J.) April 13, 1966]

[Jesselton — Criminal Appeal No. 3 of 1966]

Road Traffic — Charge of driving vehicle not covered by third party insurance — Proof of offence — Excess passengers carried in bus — Road Traffic (Third Party Insurance) Ordinance (Cap 129), ss. 3 & 7.

The accused was charged and convicted of an offence of carrying 31 passengers in a bus while the vehicle was licensed to carry only 30. He was also charged with the offence of driving a vehicle not covered by third party insurance. The accused's plea was recorded as one of guilty, and the prosecution in the course of its statement of the facts said he was licensed to carry only 30 passengers and that as a result of this he was not covered by third party insurance.

Held: (1) although the onus of producing the insurance policy was on the assured, in cases of this nature the trial magistrate should call for the relevant insurance policy before recording a conviction in order that he might be satisfied that the charge under the Road Traffic (Third Party Insurance) Ordinance was well grounded;

(2) in this case the learned magistrate had not taken into consideration paragraph (c) of section 7 of the Road Traffic (Third Party Insurance) Ordinance, which in effect made any restriction in the insurance by reference to the number of persons carried in the vehicle ineffective, and therefore the conviction must be set aside.

Case referred to:—

(1) *Lau Jin Heng* v. *R.* [1959] S.C.R. 64.

CRIMINAL APPEAL.

Shelley Yap Yeok Siew for the appellant.

John Chong (Deputy Public Prosecutor) for the respondent.

Silke J.: This is an appeal against conviction and sentence imposed in the Magistrate's Court Tawau upon a charge under subsection (1) of section 3 of the Road Traffic (Third Party Insurance) Ordinance (Cap. 129). The accused was fined the sum of $40 and disqualified from driving for one year.

At the hearing this charge and two other charges, one under subsection (4) of section 64 of the Road Vehicles Ordinance in relation to the carriage of 31 passengers in a bus when the vehicle was licenced to carry 30 only and one under Rule 30 of the Road Traffic Rules in relation to the failure to display a vehicle licence, were tried together. I am not concerned with these two charges except in so far as the charge under section 64 relates to the charge under section 3 of the Road Traffic (Third Party Insurance) Ordinance.

The plea of the accused, who was the driver of the bus, is recorded as

"I plead guilty to charges numbers 2 and 3 openly but I did not know that there were more than 30 passengers on my bus until we were stopped and checked by the police".

This was entered as a plea of guilty to all three charges. The trial magistrate having heard the statement of facts of the prosecution then made a finding as follows: "accused found guilty on his own plea as charged", and proceeded to sentence.

The first ground of appeal was that section 43 of the Interpretation and General Clauses Ordinance, 1963 would prohibit the joinder of two charges viz., one under section 64 of the Road Vehicles Ordinance and the other section 3 of the Road Traffic (Third Party Insurance) Ordinance because both offences were already provided for in the Road Vehicles Ordinance.

While it is correct that section 24 of that Ordinance gives the court power to disqualify for any offence in connection with the driving of a motor vehicle the two charges here are separate and distinct. It was open to the magistrate, on conviction, to order disqualification on both charges. This he did not do but exercised the mandatory power of disqualification under section 3 of the Road Traffic (Third Party Insurance) Ordinance.

There was nothing improper in joining these two charges, on their face, what was improper, and I shall come to this later, was to deal with them as if the facts basing the Road Vehicles Ordinance charge were sufficient to sustain the insurance charge. This ground fails.

The second ground of appeal has two heads the first being irrelevant as there is no appeal before this court from the conviction on the first charge under the Road Vehicles Ordinance the second being that "The prosecution failed to produce the insurance policy in respect of the vehicle concerned". The ground goes on to allege that there was in fact a policy and that that policy was in order.

It was held in *Lau Jin Heng* v. *Regina* [1] that "It is for the person accused of an offence under section 3 of the Motor Vehicles (Third Party Risks) Ordinance to produce his insurance policy if he relies upon it by reason of section 108 of the Evidence Ordinance". The Ordinance and section above quoted are part of the Sarawak legislation and the provisions in Sabah are similar. I follow this decision of Brigg J. and this ground also fails.

Of the other grounds of appeal the only relevant one is ground (3) which reads "Plea of guilty to charge 2 did not amount to a real plea of guilty".

Having said that the onus of producing a policy of insurance, if one exists, is upon the accused I would go on to say that in cases of this nature when the one charge clearly follows upon the other the trial magistrate should call for the relevant insurance policy before recording a conviction in order that he may be satisfied that the charge under the Road Traffic (Third Party Insurance) Ordinance is well grounded.

Here, although this was not raised as a ground of appeal, the prosecution in the course of its statement of the facts said "he was licenced to carry only 30 and that as a result of this he was not covered by third party insurance". The magistrate clearly accepted this in convicting the accused ignoring the provisions of para (c) of section 7 of Cap. 129 which states "where a certificate of insurance has been issued under subsection (4) of section 4 to the person by whom a policy has been effected so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters (c) the number of persons

that the vehicle carries, shall as respects such liabilities as are required to be covered by a policy under paragraph (b) of subsection (1) of section 4 be of no effect.

There was no allegation here that no policy existed. The basis of the charge would appear to be that one extra passenger was carried thus invalidating the insurance policy. This case and the other similar cases which I heard at Tawau and in which I allowed the appeals, the reasons for which I now reduce to writing, would never, if there had been proper preliminary investigation action, have been brought.

In the circumstances I do not think that accused's plea of guilty was an unequivocal one, I doubt if he understood the charge. Magistrates should be careful to record each plea, where there are more charges than one, separately and not as here in a compendium plea.

In the event and to avoid a miscarriage of justice I allowed the appeal against conviction quashed the conviction and sentence and discharged the accused.

Appeal allowed.

SYMES v. LING NGAN NGIENG

[O.C.J. (Gill J.) April 13, 1966]

[K.L. — Civil Suit No. 1130 of 1965]

Negligence — Child left unattended crossing road — Degree of care — Contributory negligence of child — Negligence of person in charge of child whether relevant — Damages.

Damages — Personal injuries — Facial disfigurement — Assessment of damages.

The infant plaintiff sued by her next friend for damages for personal injuries suffered as a result of her being knocked down by a motor car driven by the defendant when she was crossing the road. It appeared that the infant plaintiff had been left in a car by her mother, who had crossed the road, to go to a shop. Sometime later the infant plaintiff got out of the car and crossed the road in the direction in which she had seen her mother go. After she had crossed the middle of the road she was knocked down by the defendant's car.

As a result of the accident the plaintiff had a deep lacerated wound 6" long running across her face involving the nasal bone and the lower margin of the left orbit. She was left with a permanent disfigurement of her face by reason of two large and prominent scars. There was also a scar causing her left nostril to narrow as it went down. This had caused a certain amount of blocking of the left nostril which would obstruct the normal flow of the nasal discharge during cold. Furthermore, her mouth was slightly crooked to the left when she smiled because the muscles of her right cheek did not pull up the right angle of the mouth. The orthopaedic surgeon opined that plastic surgery might reduce the facial disfigurement to some extent; but the scars would still remain.

Held: (1) the defendant was entirely to blame for accident and must be held liable for damages;

(2) even if there was evidence of negligence on the part of the plaintiff in this case, in view of her age no contributory negligence could be attributed to her;

(3) the negligence of the person in charge of the child was no answer to the claim made by the plaintiff against the defendant;

(4) taking into account the pain and suffering that she must have undergone and the permanent disfigurement of her face which was likely to disappear completely by plastic surgery, general damages would be assessed at $10,000.

Cases referred to:—

(1) *Carmarthenshire County Council* v. *Lewis* [1955] A.C. 549.

(2) *Lynch* v. *Nurdin* (1841), 1 Q.B. 30.

(3) *Oliver* v. *Birmingham and Midland Motor Omnibus Co. Ltd.* [1933] 1 K.B. 35.

CIVIL SUIT.

Balwant Singh for the plaintiff.

Chew Kok Chooi for the defendant.

Cur. Adv. Vult.

Gill J.: The infant plaintiff in this case is suing by her next friend, who is her mother, for damages in respect of personal injuries suffered as a result of her being knocked down by motor car No. SB 3904 which was driven by the defendant when she was crossing the road at 2½ milestone, Klang Road, Kuala Lumpur.

The facts of the case are as follows. On 12th January, 1965 at about 7 p.m. the plaintiff's mother, Mrs. Kim Symes nee Lee Kim Lan, was travelling in her car from Petaling Jaya towards Kuala Lumpur with the infant plaintiff. On reaching 2½ milestone, Klang Road she parked her car on the left side of the road facing Kuala Lumpur, got out of it and crossed the road in order to deliver soiled laundry to a dhobi shop on the other side of the road, leaving the infant plaintiff in the car and closing its doors. As she was coming out of the dhobi shop after a few minutes she saw a car drive past very fast from the direction of Kuala Lumpur towards Petaling Jaya. As soon as the car went past, she heard a child's cry and saw the plaintiff picking up herself from the road. The plaintiff was then quite close to the grass verge on the left side of the road facing Petaling Jaya as she had almost reached the other side of the road. Mrs. Symes went towards her child and saw the car which had gone past stop at a place about 40 feet from where the child was. She then saw the defendant and another man go up to her child. The other man carried the child into the car and the three of them took her first to Assunta Hospital, where she was given first aid, and then to the General Hospital, Kuala Lumpur. On the way to Assunta Hospital and later to the General Hospital the defendant is alleged to have told Mrs. Symes that it was not his fault. He said that he did not see the child because she was too small. Later he said that he saw the child and tried to avoid her, but it was too late. He is